

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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PP Docket No. 93-253

In the Matters of)

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding)
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**INITIAL COMMENTS
OF
JMP TELECOM SYSTEMS, INC.**

JMP Telecom Systems, Incorporation ("JMP") and in accordance with the Commission's Notice of Proposed Rulemaking, FCC 93-455, Adopted September 23, 1993 and Released October 12, 1993 (the "NPRM"), hereby files its Initial Comments in this proceeding:

INTRODUCTION

JMP commends the Commission for their efforts in preparing the proposed rulemaking for the Implementation of Section 309(j) of the Communications Act as mandated by the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). JMP files the following comments.

1. **Experimental and Pioneer Preference Licenses.** Agree with the Commission's decision to implement competitive bidding, as mandated by the Budget Act beginning with the award of Personal Communications Services (PCS) licenses. However, the Commission must be careful how they treat businesses and individuals who invested and who taken the risks to develop new technologies, and brought new/improved products and services to the market place. The Commission under President Reagan and President Bush administrations encourage businesses like JMP and individuals to start new developments by awarding Experimental and Pioneer Preference licenses. The ownership of an Experimental license or of a Pioneer Preference license encouraged businesses and individuals to start new developments (technologies, products, services). Experimental and Pioneer Preference licenses represented to those businesses and individuals the opportunity to

obtain a permanent operating license as a reward by successfully developing new technologies, and bringing new or improved products and services to the market place.

Businesses and individuals invested significant amount of funds and actively participated in new ventures that had obtained (or applied for) Experimental and/or Pioneer Preference Licenses. Current (and pending) license holders of Experimental and Pioneer Preference licenses are at risk of losing everything in the proposed rulemaking. The Commission plans to take away those licenses. The Commission proposed to give no considerations or any preference in auction process to current (and pending) license holders. The proposed Commission action is unfair and petitions for reconsideration will be filed to protect their rights. Recommends the Commission reject this plan of action and grant permanent licenses to those entities that successfully develop new technologies or brought new services to the market place before the Commission recognizes it as a new class of service (e.g., Local Multipoint Distribution Service). This will be consistent with the original Commission intentions as promoted under previous Administrations. Otherwise, future Commission efforts to promote or encourage the telecommunications industry to develop new technologies and services will be somewhat tarnished if the proposed Commission's actions are implemented.

2. Preferential Treatment for Designated Groups (Small Businesses, Rural Telephone Companies, and Businesses Owned By Women and Minorities).

Concurs with the Commission proposals to give preferential treatment to designated groups if competitive bidding is used to award those licenses as determined by the Commission. Otherwise, large companies such as the existing BELL telephone companies will be able to monopolize the auctions by outbidding most individuals and businesses.

The requirement as mandated by the Budget Act requires the Commission to give preferential consideration to small businesses, rural telephone companies, and businesses owned by women and minorities in the competitive bidding process. This law will be difficult to implement based upon past and recent court rulings as it relates to the definition of a "minority". The definition to what groups should be given minority preferences (e.g., race, ethnic background, sex, sexual orientation, etc.) will probably be unresolved for the near future as the U.S. Courts will probably be asked to resolve the issues. The "minority" definition is a risk to the Commission's objective of bringing new technologies and services to the market place as soon as possible because the high potential of litigations from different minority groups.

The Commission's "small business" definition (In terms of assets, size, sales, number of employees, etc.) must be carefully defined. The attributes of the "small business" definition can possibly eliminate a large number of current

and future telecommunication businesses from the auction process. Small businesses who believe the definition is not appropriate will probably petition the Commission for reconsideration or request the U.S. Courts to resolve the issue(s). This is another risk area to the Commission's objective of bringing new technologies and services to the market place as soon as possible.

To avoid the unnecessary litigations and the time delays, recommend the Commission amend the proposed rulemaking as follows:

(a) Award one set of market licenses by the competitive bidding process for large firms (e.g., existing BELL telephone companies). All of the Commission proposed rules for competitive bidding will apply.

(b) Award another set licenses in the same market by lottery to applicants of designated groups (e.g. similar licenses with identical bandwidth). The lottery winner must paid the U.S. Government a percentage of the yearly gross revenues over time. The amount of payment to the U.S. Government will increase over a time span of fifteen years (e.g., 3% to 10%) until the system operator fully pays the price of the lowest bid in the comparable market license auction. The lottery should be conducted after the auction winners are declared, for identical market licenses, to establish the initial market license values. Tax penalties should be enacted to discourage speculative operators from selling their licenses before the Commission's performance requirements are satisfied (e.g., minimum service time of 3 years; 80% market build-out over 5 years; etc.). The system operator should not be allowed to make any profit from a premature sell of a license if the system operator fails to satisfy the Commission performance requirements.

JMP disagrees with the Commission's statements in Rulemaking Section 70. The Commission stated to collect a royalty percentage of the system revenues would be difficult to implement. If the Commission defines the royalty guidelines to be pay over time, the potential applicants can perform cash flow analyses to determine whether it is feasible to perform business in the given market(s) before they submit their applications. The percentage of gross revenues payments should be considered in the applicants' cash flow projections. Applicants of previous lotteries (e.g., cellular) had to contend with a similar problem when they paid monthly management fees. A prudent business individual would normally perform cash flow projections before their applications are submitted.

The above recommendations will satisfy the intent of the law as mandated by the Budget Act. By retaining the lottery process for designated groups, it would eliminate the risk of court litigations and treat all lottery applicants (small businesses, rural telephone companies, and businesses owned by women and minorities) on an equal basis. Past lotteries helped to shield the Commission from discrimination law suits. The above recommendations will also insure the

Commission can meet it's goal of rapid deployment of new technologies and services to the market place.

3. **Oral Bidding.** Oral bidding will be handicap to small businesses, rural telephone companies, and businesses owned by women and minorities to obtain future licenses. Designated groups (e.g., small businesses and businesses owned by minorities) may not have the necessary manpower to participate in spectrum auctions in Washington, D.C. JMP believes the Commission must provide the system and the means to allow businesses and individuals to make bids by electronic means or by sealed bids. Comment #2 above is the recommended method to award licenses to designated groups for preferential treatment.

4. **Upfront Tender Payments.**

a. The Commission proposed to require each bidder to tender in advance a substantial upfront payment in order to participate in the spectrum auctions. If this rule is enacted, the Commission should return the upfront payments of the auction losers within 48 hours after the auction. The Commission can accomplish by means of electronic cash transfers to deposit the auction losers' funds to their accounts. The initial filing application (short form) can request each bidder to identify an account which the funds of the auction losers will be transferred within 48 hours after the auction. Otherwise, businesses and individuals will their ability to apply those unused funds towards to other spectrum auctions or to other business ventures. This is a major concern to business and to individual applicants.

b. Substantial upfront nonrefundable filing fees should be imposed on applicants who are allowed to participate in designated group(s) lottery(ies). JMP recommends the Commission imposed a nonrefundable filing fee of five thousand dollars or more to deter the filing of speculative applications.

5. **Group Bidding.** Agree with the Commission's proposal to permit group bidding for all fifty-one Major Trading Area ("MTA") licenses to facilitate a nationwide PCS service if all licenses are being auctioned. An alliance small businesses should be given the same opportunity to obtain one or more MTA PCS licenses. Alliances of major firms such as AT&T and McCaw will have the financial muscle to outbid any alliance of small businesses who are bidding for MTA PCS license(s). The Commission must enact safeguards to prohibit the aggregation of market power that can easily led to anti-competitive conduct if all the licenses for the same service are authorized for group bidding.

6. **Auctioning Procedures.** Agree with the Commission's conclusion there is

a need to establish a variety of auctioning procedures independent of a particular service. The Commission should be restricted or refrain from changing auctioning methods and procedures in mid-stream without regard for applicants who relied upon earlier Commission pronouncements.

7. Clarification to Rulemaking Reference 21. The Commission did not enforce the rules to require the lottery cellular winners to build out their markets. The lack of enforcement opened the flood gates to allow license transfers before the systems were ever constructed. The Commission rules proposed in Notice of Proposed Rule Making for Cellular Fill-In, for Interactive Video Data Services ("IVDS") and for Local Multichannel Distribution Service ("LMDS") would require license winners to build out and operate their before the license can be sold.

8. Applicability to Broadcast Television and Radio. Disagree with the Commission proposal to exclude commercial broadcast television and radio from the competitive bidding process. Commercial broadcast television and radio license holders receive compensation for their services indirectly from their advertisers for given a given program(s). The Commission should receive royalty payments from new commercial broadcast television and radio license holders as percentage of their gross revenues. Public and non-profit broadcast television and radio licenses should be excluded from the competitive bidding process or any royalty payment requirement.

9. Licensee Defaults. The Commission should have procedures to handle default payments to the U.S. Government. The Commission can use the guidelines used by the Internal Revenue Service ("IRS") to establish the Commission procedures. Default payments is a reality the Commission must be ready to handle. Designated groups may not have the experience or the resources to overcome major mistake(s). One method the Commission can employ to reduce the number of default payments is to require each licensee to obtain bankruptcy insurance. The bankruptcy insurance would pay the outstanding obligation to the U.S. Government if a default condition is declared after ninety days. Any outstanding payments older thirty (30) days or longer should be charged a fixed interest rate established by the prime banking institutions. If any licensee defaults more than twice in any twelve month period, the licensee should be declared as a distressed license by the Commission. The distressed license holder(s) must be order sell their license(s) on the open market by any approved brokerage firm. If the distressed licensee has insurance to cover such a situation/condition and the insurance pays the U.S. Government of all obligations, the licensee should retain all existing license(s) holdings.

10. Performance Requirements. Concur with the Commission efforts to establish performance requirements to prohibit the sell of licenses before the system is ever constructed. The Commission rules for Interactive Video Data Services ("IVDS") is an excellent example that can be used to establish the performance requirements for existing services and future services.

11. Prohibit of Collusion. The Commission to should adopt the necessary rules to prohibit the collusion between bidders. Recommend the Commission require bidders found guilty of collusion be prohibited in future licensing activities for five years and be forced to liquidate all licenses within 6 months. All profits made from the sell of telecommunication licenses should be retain by the U.S. Government as an additional penalty for collusion.

12. Application Processing Requirements.

a. Concur with the Commission's proposal to use the short form for the initial application fillings. The selected applicant(s) of any designated group(s) should have 30 to 45 days to submit an engineering application (long form) for their selected market(s). The selected applicant(s), of any designated group, may not have the resources to complete the long form for each market before any given lottery or auction event.

b. The Commission should prohibit the award of licenses to those entities who filed as a trust.

13. Rulemaking Reference 92. No modifications to an existing filing should be approved by the Commission for the situation as stated.

14. Rulemaking Reference 95. The Commission proposed to have cashier checks drawn from U.S. banks with assets more than one billion dollars. This rule maybe a handicap to applicants from designated groups. Not all communities have U.S. banks with assets greater one billion dollars.

15. Rulemaking Section 100. The Commission should establish short term accounts for each bidder by buying Treasury bills to earn interest on the upfront tender payments. Funds collected as lottery filing fees are to be excluded from this requirement. Lottery filing fees as proposed above should be nonrefundable. Interested earned on the funds will be given back to the auction losers.

16. Rulemaking Section 111. The Commission rules should state that any applicant who files a Petitions to Deny, and later the Commission determines the petition to be frivolous, the filing applicant shall incurred all costs. Unnecessary petitions tend to delay the award of licenses to valid license holders.

17. Application of Competitive Bidding to Specific Services.

a. The Commission needs to clarify how their proposals affect existing or pending license holders. Under existing rules, the Commission is scheduled to award licenses to those applications that were selected by lottery.

b. Disagree with the Commission's proposal to apply competitive bidding to current and future applicants of wide-area Specialized Mobile Radio Service ("SMRS"). The Commission's proposal will have significant impacts to existing investors and the business structures who provide 800 MHz/900 MHz SMR service. Changes to existing rules at mid-stream of the licensing process will have significant impacts to current and future service providers. Unfair market advantages will exist if pre-existing license holders, before July 26, 1993, do not have to factor cost of the license in their cash flow projections.

c. Sections 150 and 151. Concur with the Commission's proposal to continue the lottery process for those Multichannel Multipoint Distribution Service ("MMDS") applications filed before the July 26, 1993. Changes to existing rules at mid-stream of the licensing process will have significant impacts to current and future service providers. Unfair market advantages will exist if pre-existing license holders, before July 26, 1993, do not have to factor cost of the license in their cash flow projections.

d. Rulemaking Section 152. The Commission should grant or consider those Local Multipoint Distribution Service ("LMDS") applications filed before the July 26, 1993 based upon the Court of Appeals decision of McElroy Electronics Corporation vs F.C.C. The decision dealt with cellular fill-ins, but focused on Administrative Law and Procedure Issues. It states the Commission can not simply change its rules at mid-stream without regard for applicants who relied upon earlier Commission pronouncements. The applicants in this case never appear on Public Notice as valid applicants and the ruling required the Commission to consider the applicants filed before the Commission mid-stream changes to the filing regulations.

Applicants who filed and were accepted by the Commission, placed on Public Notice, should be awarded by the pre-July 26, 1993 rules. For any exclusive application of any market, the competitive bidding process is not applicable. The Commission should award those exclusive market filings.

If the Commission decides to award LMDS licenses by the

competitive bidding process, then the auction process must be restricted to those pre-rulemaking market applicants.

As stated in the LMDS Notice of Rulemaking, existing filers are being rejected without consideration. If this proposed rule is enacted, the Commission must declare the existing filers as defective and explain why the pre-rulemaking LMDS applications were defective. This clarification is crucial for the pre-rulemaking LMDS applicants so they can determine what course of action to proceed with.

f. Rulemaking Sections 158 and 160. The Commission should grant or consider those Cellular Fill-In applications filed before the July 26, 1993 based upon the Court of Appeals decision of McElroy Electronics Corporation vs F.C.C. The decision dealt with cellular fill-ins, but focused on Administrative Law and Procedure Issues. It states that the Commission can not simply change its rules at mid-stream without regard for applicants who relied upon earlier Commission pronouncements. The applicants in this case never appear on Public Notice as valid applicants and the ruling required the Commission to consider the applicants filed before the Commission mid-stream changes in application filing regulations.

Applicants who filed and were accepted by the Commission, placed on Public Notice, should be awarded by the pre-July 26, 1993 rules. For any exclusive application of any market, the competitive bidding process is not applicable. The Commission should award those exclusive market filings.

19. Summary of Proposed Auction Procedures.

a. Rulemaking Section 167. The auction consultant(s) hired by the Commission should be an entity who does not have any direct or indirect conflicts with the telecommunication industry. The Commission should insure the auctioning process maintains a high degree of integrity. The background of the consultant(s) should be placed on Public Notice to assure to verify no conflict of interest exist.

b. Rulemaking Section 168. The proposed lead time of the bid packages should be at least 120 days for the upcoming auctions.

Respectively submitted,

JMP Telecom Systems, Inc.

By: James M Rhoads

James M. Rhoads
President

PO Box 292557
Kettering, Ohio 45429
Phone: (513) 435-3836
Fax: (513) 435-7380

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